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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM TAYLOR, Plaintiff, v. CITY OF BURBANK and DOES 1 through 100, inclusive,, Defendants.	Case No. BC 422252 DEFENDANT CITY OF BURBANK'S OPPOSING SEPARATE STATEMENT OF SPECIAL INTERROGATORIES AND RESPONSES IN PLAINTIFF'S MOTION TO COMPEL Date: April 22, 2010 Time: 8:30 a.m. Dept. 50

Defendant City of Burbank ("City") hereby submits its Opposing Separate Statement of Special Interrogatories and Responses in Plaintiff's Motion to Compel as follows:

INTERROGATORY NO. 2:

Identify each and every witness that has knowledge for the reasons of the demotion of Plaintiff from the rank of Deputy Chief to Captain.

RESPONSE TO INTERROGATORY NO. 2:

City objects to this interrogatory on the ground that it is misleading and that it assumes

facts not in evidence as plaintiff was not demoted to Captain. City further objects to this interrogatory on the ground that it seeks information protected from disclosure under Penal Code §832.7 and Evidence Code §1043. Notwithstanding, but subject to this objection, City responds as follows on information and belief:

The following witnesses were aware of the reasons for the restructuring: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the Department who received the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons, and City Manager Mike Flad. Witness information gathered or generated during the investigation into alleged improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will be provided when and if they are discoverable.

REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:

It is clear from defendant's response that defendant relies upon "witness information gathered or generated during the investigation into alleged improprieties by plaintiff' in regard to the alleged reasons for its demotion of plaintiff from Deputy Chief to Captain. Indeed, defendant claims that the "the most serious contributing factor" relied upon by defendant in demoting plaintiff was the alleged improprieties of plaintiff which are the subject of these alleged confidential investigations. Defendant cannot have its cake and eat it too. Plaintiff is entitled to be apprised by defendant under oath of all facts, witnesses, and documents that defendant claims allegedly support its contentions in this matter so that plaintiff may rebut same and demonstrate that such alleged reasons are false, pretextual, and a sham, and that the real reason for the demotion and other adverse employment actions taken against plaintiff was retaliation by defendant for plaintiff engaging in activities protected by *Labor Code* Section 1102.5 and FEHA.

The *McDonnell Douglas* burden-shifting framework applies in FEHA retaliation cases as well as discrimination cases under both federal and state law. The same framework also applies to retaliation actions premised on violations of *Labor Code* Section 1102.5. *Patten v. Grant Joint Union High School District* (2005) 134 Cal.App.4th 1378. Under this framework, a plaintiff is required to establish a prima facie case, which consists of showing that: a) plaintiff engaged in a protected activity; b) the employer subjected plaintiff to an adverse employment action; and c) a

causal link exists between the protected activity and the employer's action. *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 506 (under Title VII); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044, 32 Cal.Rptr.3d 436, 446 (under FEHA).

The causal link may be based solely on the timing of the relevant actions: "Specifically, when adverse employment decisions are taken within a reasonable period of time after complaints of discrimination have been made, retaliatory intent may be inferred." *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 507; *Mulhall v. Ashcroft, supra,* 287 F.3d at 551; *Mariani-Colon v. Department of Homeland Security ex rel. Chertoff* (1st Cir. 2007) 511 F.3d 216, 224 temporal proximity (2 months) between protected activity and discharge sufficient for relatively light burden of establishing prima facie case of retaliation.

Thus, the temporal relationship between engaging in the protected activity and a subsequent adverse employment action is circumstantial evidence of retaliation. *Flait v. North American Watch Company* (1992) 3 Cal.App.4th 467, 478 -479. A series of acts on the part of a defendant employer which proceed in linear fashion from whistleblower disclosures and culminating in adverse employment actions present a triable issue of material fact as to a "causal link" between the protected activity and the adverse employment action. *Patten v. Grant Joint Union High School District, supra,* 134 Cal.App.4th at 1390. Here, the temporal and linear connection is both direct and obvious. Moreover, the relationship between plaintiff's whistleblowing activities and the adverse employment actions is sufficient by itself to provide circumstantial evidence of retaliation sufficient to establish a prima facie case. In *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, the court noted that "suspicious" timing of the employer's actions may provide the circumstantial link needed to infer that an improper purpose accounted for the adverse action. (Id. at 1154.) "The timing of the decision may have been coincidental, but when viewed as part of the mosaic of evidence" plaintiff presented, it will support the causal element of an employment claim. As stated in *Passantino v. Johnson & Johnson Consumer Prods., Inc.* (9th Cir 2000) 212 F.3d 493, 507: "[T]his close timing provides circumstantial evidence of retaliation that is sufficient to create a prima facie case of retaliation."

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(noting that causation can be inferred from timing alone.); See also, e.g. *Miller v. Fairchild Indus.* (9th Cir. 1989) 885 F. 2d 498, 505.

Once plaintiff has established a prima facie case, the employer must then articulate a legitimate, nonretaliatory reason for each of the adverse employment actions taken. If the defendant is able to do so, then the plaintiff must prove the employer's reason is a pretext. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1065; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.

Here, plaintiff engaged in the activities of whistleblowing and reporting and protesting discrimination in the workplace, which activities are protected activities under Labor Code Section 1102.5 and FEHA. Within a short time of engaging in such protected activities plaintiff was demoted from the rank of Deputy Chief to Captain, and has subsequently been placed on administrative leave, based upon alleged reason that plaintiff had engaged in improprieties, including that plaintiff had improperly interfered in and attempted to influence an internal affairs investigation. Plaintiff contends that this alleged reason is false and a sham, and is simply a pretext for retaliating against plaintiff based upon his engaging in the protected activities enumerated above. It is well settled that evidence of dishonest reasons for adverse employment actions proffered by the employer permits a finding of prohibited motive, bias, or intent. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148- 149, 120 S. Ct. 2097, 2109; *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511, 518, 113 S. Ct. at pp. 2749-2750, 2753.

Pretext, like a prima facie showing of causation, may be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination. *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 156 - 157; *Flait v. North American Watch Co., supra*, 3 Cal.App.4th at 478 - 479; see also, *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 505-06 (9th Cir. 1989). These factors support an inference that defendant's stated reason for taking adverse employment actions against plaintiffs were merely a subterfuge for its retaliatory conduct. See, *Sada v. Robert F. Kennedy Medical Center, supra*, 56 Cal.App.4th at 156; *Flait v. North American Watch Co., supra*, 3 Cal.App.4th at 480 ("Viewing the evidence in the light most

favorable to [the plaintiff], a reasonable trier of fact could conclude that [the defendant's] articulated reasons for terminating [the plaintiffs] employment are not worthy of credence").

As such, the information and documents sought by this motion are directly relevant and discoverable in regard to the defendant's alleged reason for the adverse employment actions taken against plaintiff, and are directly relevant and discoverable in regard to plaintiff establishing that the defendant's proffered reason is false and pretextual.

II. THE INFORMATION AND DOCUMENTS REQUESTED ARE NOT PRIVILEGED UNDER *EVIDENCE CODE* SECTION 1040, ET SEQ.

Defendant vaguely claims that the "witness information and documents gathered or generated during the investigation into alleged improprieties by plaintiff, which is ongoing and as such remains confidential and privileged". However, during the meet and confer process in regard to this motion, defendant cited only a single case, *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, in support of its position that the information and documents sought are confidential. The County of Orange case is readily distinguishable, and does not support defendant withholding the information and documents sought under the facts of this case.

In the County of Orange case, the plaintiffs sought to obtain the files regarding an on-going criminal homicide investigation regarding the murder of a two year old boy in which the plaintiffs had been identified as two of the primary suspects. The court held as follows:

> "We conclude on the record before us that the public interest in solving C. T. Turner's homicide and bringing the perpetrator(s) to justice outweighed the Wus' interest in obtaining the discovery sought, at least at the time this matter was considered below. We recognize the rather arbitrary nature of this conclusion, but the order we review was made less than a year after this civil action was filed. (And it is still less than three years since it was filed.) When one reflects that the lives of other children may be at risk with the killer(s) still at large, the important interests in vindicating wronged plaintiffs and clearing dockets do not seem quite so important. Consequently, we find the superior court abused its discretion in ordering production of the investigative file to the Wus' attorney. And, parenthetically, we think that most reasonable parents in the Wus' position would concur that the interest in apprehending a child's killer must continue to take priority over any civil action of theirs. 79 Cal.App.4th 759, 767 - 768.

Here, there is no unsolved homicide of a child that is being investigated by the defendant

in which plaintiff is a suspect. Indeed, there is no criminal investigation of any kind being conducted by the defendant in which plaintiff is a suspect. At best, defendant claims to be investigating alleged violations of its own internal policies regarding the conducting of internal affairs investigations. Defendant cannot possibly cite to any public interest in maintaining the confidentiality of the information and documents at issue that approaches in any way the magnitude of the public interest in apprehending the murderer of a two year old boy. Indeed, exactly the opposite is true - the public interest in assuring that law enforcement officials such a plaintiff, the former Deputy Chief of the defendant's own police department, be free to report wrongdoing and discrimination by other members of his police department without fear of retaliation, clearly outweighs any alleged confidentiality interests of the defendant. Here, the public interest overwhelmingly supports that plaintiff be provided with all of the information and documents necessary to rebut defendant's specious and retaliatory claims of misconduct by plaintiff, and to protect plaintiffs statutory rights to report the misconduct of defendant and its employees.

III. PLAINTIFF AND HIS COUNSEL SHOULD BE PROVIDED THE INTERNAL AFFAIRS STATEMENTS AND OTHER DOCUMENTS REGARDING THE INCIDENTS AT ISSUE IN ORDER TO REBUT DEFENDANT'S ALLEGED REASON FOR TAKING ADVERSE ACTIONS AGAINST PLAINTIFF, TO PREPARE FOR DEPOSITIONS AND TRIAL, AND TO BE ABLE TO IMPEACH THE TESTIMONY AND REFRESH THE RECOLLECTIONS OF WITNESSES, AS HAS BEEN SPECIFICALLY FOUND PROPER IN THE *HAGGERTY v. SUPERIOR COURT* CASE

In *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1089, the court specifically held that disclosure pursuant to the Pitchess procedure of internal affairs investigation reports and other investigative materials regarding the incident at issue in the civil case against a deputy sheriff, including internal affairs interviews, transcripts, and other data, was proper. Here, similarly, the Court should order the production of all relevant reports, investigative materials, interviews, transcripts, and other data regarding the investigation and disposition of any complaints of misconduct allegedly involving plaintiff.

Here, as in *Haggerty v. Superior Court, supra*, 17 Cal.App.4th at 1089-1091, the facts

gleaned from the internal investigations at issue are directly relevant to the matters at issue in the lawsuit. Moreover, as in *Haggerty*, the requested discovery is important, not only for determining the events that occurred during the incidents, but also for plaintiffs counsel to prepare effective cross-examination of defense witnesses, including to impeach witnesses whose testimony at trial differs from statements made to the investigating officers and/or to refresh the recollections of these witnesses. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 417; see also, *People v. Memro, supra*, 38 Cal.3d at 677 ["one legitimate goal of [*Pitchess*] discovery is to obtain information 'for possible use to impeach or cross-examine an adverse witness.] See also, *Garden Grove Police Department v. Superior Court, supra*, 89 Cal.App.4th at 433.

Plaintiff is therefore entitled to the requested information not only to use as substantive evidence to establish that defendant's alleged reasons for the adverse employment actions at issue are pretextual, but also to use to impeach the testimony and/or refresh the recollections of defense and other witnesses. As in *Haggerty*, the investigations at issue concern the very incidents that are the subject of the civil claim. Additionally, as in *Haggerty*, the privacy concerns of defendant and its employees are diminished because they are the persons and/or entities whose conduct is at issue in the litigation, and the requested internal investigation records concern their actions that are alleged to be wrongful and will be fully litigated at trial.

Because of the direct relevance of the information, courts have recognized that the law enforcement records of the investigations of the matters at issue in the case are discoverable and have never imposed any special limitations on this disclosure if the requested discovery otherwise meets the statutory criteria. (See *Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 978 - "[a]It statements made by percipient witnesses and witnesses ... related to the incident in question ... are discoverable under the standards set forth in *Pitchess*"; see also *People v. Alexander* (1983) 140 Cal.App.3d 647, 659, disapproved on another point in *People v. Swain* (1996) 12 Cal.4th 593.

Further, the *Haggerty* court also rejected the contention that the disclosure of relevant internal affairs records would have a chilling effect on every law enforcement agency's ability to conduct an uninhibited, thorough and candid analysis of a complaint, finding such concerns

speculative. The court noted that the question of whether police investigation records are discoverable has been unequivocally answered in the affirmative by the Legislature in enacting the *Pitchess* statutory scheme, and that the *Pitchess* "legislation was intended to balance the need of criminal defendants [and civil litigants] to relevant information and the legitimate concerns for confidentiality of police personnel records." *People v. Breaux* (1991) 1 Cal.4th 281, 312. The court held that in balancing these interests, the Legislature made a decision that relevant evidence contained in a personnel file, including internal investigation records and reports, should be disclosed upon a proper showing of materiality and relevance, and did not provide any blanket exceptions to the discoverability of such reports, particularly in the civil context. *Haggerty v. Superior Court, supra*, 17 Cal.App.4th at 1091-1092.

Here, a plausible foundation exists to conclude that plaintiff was subjected to retaliation by defendant for engaging in activities protected by *Labor Code* Section 1102.5 and FEHA. The information and documents sought are directly relevant and material to plaintiff's contentions that the reason given for the retaliatory actions by defendant are false, a sham, and simply a pretext for retaliation Indeed, defendant and its counsel have conceded that such information and documents are relevant by repeatedly referencing same throughout defendant's sworn discovery responses in this matter. As such, the records pertaining to the investigations by defendant of the allegations made against plaintiff are relevant and material. The information and documents sought should be disclosed to plaintiff. In the alternative, such information and documents should be examined by the court *in camera*, and all evidence relevant to plaintiff's claims should be turned over to plaintiff's counsel.

IV. THE INFORMATION AND DOCUMENTS REQUESTED ARE NOT PRIVILEGED UNDER THE ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK PRODUCT DOCTRINE

An employer waives the attorney-client and attorney work product privileges regarding the contents of an investigation by raising the fact of the investigation as a defense. *Wellpoint Health Networks, Inc. v. Sup.Ct.* (McCombs) (1997) 59 Cal.App.4th 110, 122-124, 128 - defendants waived attorney-client privilege regarding contents investigation of plaintiffs sexual harassment claim by raising fact of investigation as defense. (See also, McGrath v. Nassau

County Health Care Corp. (ED NY 2001) 204 F.R.D. 240, 244. Where the employer relies on the investigator's report to show that it conducted an adequate investigation of charges, that report will be subject to pretrial discovery, even if the investigator was an attorney. *Wellpoint Health Networks, Inc. v. Sup.Ct.* (McCombs) (1997) 59 Cal.App.4th 110 - employer's pleading adequacy of its investigation as defense waives attorney-client privilege and work product doctrine; *Walker v. Contra Costa County* (ND CA 2005) 227 F.R.D. 529, 535 - pleading adequate investigation of harassment complaint as affirmative defense waived attorney-client privilege, self-evaluative privilege and attorney work product protection.

Further, a report that simply summarizes the investigation or presents factual conclusions for management action, and does not contain confidential legal advice, is not privileged from discovery even if it was prepared by an attorney. *Wellpoint Health Networks, Inc. v. Sup.Ct.* (McCombs) (1997) 59 Cal.App.4th 110, 121-122.

Here, the investigation at issue is being conducted by an investigator named James Gardiner, and not by any attorney. Defendant is specifically relying upon the information and documents generated by this investigation to support its denials and alleged defenses in this matter. As such, even if the attorney-client and/or attorney work product privileges applied to this investigation (which they do not), such privileges have been waived by defendant.

V. PLAINTIFF IS ENTITLED TO DISCLOSURE OF THE REQUESTED DOCUMENTS

A. Peace Officer Personnel Records Are Expressly Discoverable Pursuant to *Evidence Code* §1043(a) and 1045(a)

Evidence Code §1043 and 1045(a) provide that if the personnel records and information contained therein are relevant to the subject matter of the litigation, upon motion by the party seeking the records and information there is a right of access to the records of complaints, investigations of complaints, and discipline imposed as a result of such investigations.

Evidence Code §1045(a) provides as follows:

"(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer participated, or which he perceived, and the manner in which he performed his duties, provided that such information is relevant to the subject matter involved in

the pending litigation. (Emphasis added)

This subdivision is "expansive." *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 399. In particular, "relevant information" under *Evidence Code* Section 1045 is not limited to facts that may be admissible at trial, but may include facts that could lead to the discovery of admissible evidence. *People v. Memro, supra*, 38 Cal.3d at 681-682; *People v. Hustead, supra*, 74 Cal.App.4th at 423.

Under the statutory scheme, a party seeking discovery of a peace officer's personnel records need only file a written motion describing the type of records sought, supported by "[a]ffidavits showing good cause for the discovery..., setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." (Evidence Code § 1043 (b)(3).) This initial burden is a "relatively relaxed standard." *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84. Information is material as defined by Evidence Code § 1043 (b)(3) if it 'will facilitate the ascertainment of the facts and a fair trial.' "[A] declaration by counsel on information and belief is sufficient to state facts to satisfy the 'materiality' component of that section." *Abatti v. Superior Court, supra*, 112 Cal.App.4th at 51.

In *Santa Cruz v. Municipal Court, supra*, 49 Cal.3d 88 - 89, the California Supreme Court held that personal knowledge is not required by *Evidence Code* 1043(b) and that an affidavit on information and belief is sufficient. The Court found that in the context of Pitchess motions, the Legislature had expressly considered and rejected a requirement of personal knowledge. The Court held that the legislative history, the case law background, and the statutory language all point to the same conclusion: the "materiality" component of Evidence Code § 1043(b) may be satisfied by affidavits based on information and belief, (49 Cal.3d at 89.)

In *Abatti v. Superior Court, supra*, 112 Cal.App.4th 39, the *Pitchess* motion contained an affidavit of counsel that related statements from other officers that the former officer had been asked to leave, and had been the subject of other complaints, and was labeled a "liability" problem for the department. *Id.* at 46-47. The court considered counsel's affidavit sufficient,

even though it merely averred the contents of the counseling memos rather than stating with specificity the evidence which was contained therein. The court reasoned that to require such "specificity" in the Pitchess process would place the proponent of the motion in a "Catch-22" position of having to allege with particularity the very information he or she is seeking. *Id.* at 47, fn. 7.

VI. THE INFORMATION AND DOCUMENTS SOUGHT ARE RELEVANT AND DISCOVERABLE, AND RELATE DIRECTLY TO DISPUTED ISSUES IN THIS CASE

> Relevance is defined by Evidence Code Section 210, which provides that:
> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Relevance to the subject matter is to be broadly construed and is not limited to relevance to the narrow issues of the case. *Greyhound Corporation v. Superior Court* (1961) 56 Cal.2d 355, 378, 390. As set forth above, in the *Pitchess* motion context, a declaration by counsel on information and belief is sufficient to state facts to satisfy the 'materiality' component of *Evidence Code* § 1043(a). *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 51; *Haggerty v. Superior Court, supra*, 17 Cal.App.4th at 1086.

Here, there is a reasonable basis to conclude the internal investigation files at issue contain information that are relevant and material to the lawsuit. (See *Robinson v. Superior Court, supra*, 76 Cal.App.3d at 977 (noting that the relevancy of an investigation of the incident that is the basis for the lawsuit is "self-evident"]. Indeed, the records requested involve the investigations of the very matters which are the basis of defendant's alleged defenses in this matter, and are therefore directly relevant to the allegations in this case. Further, such documents, including the statements taken of witnesses during the internal investigations by defendant, are evidence relevant to the credibility of the witnesses.

It is unfair, unjust, and inequitable for defendant and its counsel to have access to this information and materials, to rely upon same in denying plaintiffs allegations, and to utilize same to prepare for deposition and trial, and to deny plaintiffs counsel access to the same information

and documents. *Evidence Code* Sections 1043 and 1045 are not intended to provide public entities and law enforcement agencies with an unfair advantage in defending civil actions. A public entity cannot invoke these code sections to withhold evidence relevant to the case. *Garden Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4t' 430, 433, c.f. *People v. Memro* (1985) 38 Cal.3d 658, 679. As the court stated in *Gill v. Manuel* (9th Cir. 1973) 488 F.2d 799, 803, *Evidence Code* §1040 is not "intended to provide a shield behind which law enforcement personnel may seek refuge for possible wrongdoings."

VII. Plaintiff Has Demonstrated Good Cause For The Production of the Requested Information and Documents

The declaration submitted herewith contains facts that establish a plausible foundation to conclude that defendant engaged in retaliation against plaintiff. The conduct by plaintiff which defendant contends supports its retaliatory actions against plaintiff was the subject of one or more internal affairs investigations by the defendant. Plaintiff contends that the allegations by defendant of misconduct by plaintiff are unfounded, and the information and documents regarding defendant's investigation of such alleged misconduct will demonstrate that the allegations are specious. As such, the facts regarding these matters, which are of consequence to the determination of this action, are disputed between the parties, and the requested information, documents, and items are relevant and discoverable in regard to such disputed issues.

REASON WHY FURTHER RESPONSE SHOULD NOT BE COMPELLED:

A. The City Will Amend Its Response In Light Of The Completion Of The Pending 2009 IA Investigation

This discovery request asked for information that was the subject of a then-pending internal investigation. The City accordingly and appropriately declined to provide this information until the investigation was complete. The objection to producing/providing information from an on-going investigation was both well taken and appropriate, particularly in the absence of a motion for such information under *Evidence Code* § 1043.

Evidence Code § 1043 is the exclusive method for obtaining not just police officer personnel records, but also the information from such records. *Davis v. City of Sacramento*

(1994) 24 Cal.App.4th 393, 401, fn. 2 (*citing Hackett v. Sup. Ct.* (1993) 13 Cal.App.4th 96, 99). It would serve no purpose if such privileged information could be obtained by other means, such as by written or oral questioning of the officers or department. *Id.* In addition, ongoing police investigations and all of the information contained therein, are subject to their own layer of confidentiality. *County of Orange v. Sup. Ct.* (2000) 79 Cal.App.4th 759, 765. *County of Orange* relied extensively upon *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, in which the California Supreme Court held that a Sheriff Department's internal disciplinary investigation was protected from disclosure under the Public Records Act while pending, and beyond. Assessing that holding, the *County of Orange* court held that notwithstanding that the Public Records Act does not apply to civil discovery, its express exemption of police investigative files (as noted in a case involving an internal disciplinary investigation) "reinforces the view that such files are confidential in nature." *County of Orange, supra*, 79 Cal.App.4th at 765.

As indicated in defense counsel's April 2, 2010 letter, in light of the completion of the internal investigation and its provision to plaintiff as part of the disciplinary process, the City has agreed to provide amended responses to plaintiff's discovery requests, including the discovery responses at issue herein. [Pelletier Decl., ¶ 7, Ex. C.] The City is in the process of preparing and will serve these responses on or before the date of the hearing on plaintiff's Motion. [Id..] As such, the Motion, as a motion to compel, should be considered moot as to items l-n in the Notice of Motion.

B. <u>In Fact, Further Documents Have Already Been Produced</u>

In fact, however, The City has already provided plaintiff and his counsel with the documentation of the now completed 2009 IA Investigation of him as part of an administrative process. [Varner Decl., ¶ 5.] This has provided plaintiff with the information requested in the Notice of Motion subsections a (no. 2), b, d, f, g, h, and i. Plaintiff's counsel may attempt to obfuscate the issue by claiming that such production was incomplete. However, such production included the complete report of the 2009 IA Investigation as to plaintiff and the underlying information uncovered in the investigation of plaintiff. [Varner Decl., ¶¶ 5-6.] The City also produced the records of the underlying 2008 IA investigation, No. 4-26-08-1, item no. c in the

Notice of Motion. [Id.] The only other material in the City's possession would be documents from investigations of other BPD officers in the 2009 IA Investigation that were not part of or used in the investigation of plaintiff. As discussed in the opposition, that information was not requested in this Motion, nor was a proper showing made therefore. Nor is that information related to this discovery request about information pertaining to the purported "demotion" of plaintiff. Accordingly, the Motion should be denied as moot as to all records of the 2008 IA Investigation and 2009 IA Investigation which have already been provided to plaintiff.

For all of the above reasons, no further responses should be compelled.

INTERROGATORY NO. 3:

Identify each and every DOCUMENT that refers or relates in any way to the demotion of Plaintiff from the rank of Deputy Chief to Captain.

RESPONSE TO INTERROGATORY NO. 3:

City objects to this interrogatory on the ground that it is misleading and that it assumes facts not in evidence as plaintiff was not demoted to Captain. City further objects to this interrogatory on the ground that it seeks information protected from disclosure under Penal Code §832.7 and Evidence Code §1043. In addition, City objects to this interrogatory to the extent this request seeks documents protected by attorney-client privilege or attorney work-product doctrine. Notwithstanding, but subject to this objection, City responds as follows on information and belief:

The following documents related to the restructuring: May 14, 2009 letter from Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel and payroll documents. Documents gathered or generated during the investigation into alleged improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will be provided when and if they are discoverable.

REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:

It is clear from defendant's response that defendant relies upon "documents gathered or

generated during the investigation into alleged improprieties by plaintiff' in regard to the alleged reasons for its demotion of plaintiff from Deputy Chief to Captain. Indeed, defendant claims that the "the most serious contributing factor" relied upon by defendant in demoting plaintiff was the alleged improprieties of plaintiff which are the subject of these alleged confidential investigations. Defendant cannot have its cake and eat it too. Plaintiff is entitled to be apprised by defendant under oath of all facts, witnesses, and documents that defendant claims allegedly support its contentions in this matter so that plaintiff may rebut same and demonstrate that such alleged reasons are false, pretextual, and a sham, and that the real reason for the demotion and other adverse employment actions taken against plaintiff was retaliation by defendant for plaintiff engaging in activities protected by Labor Code Section 1102.5 and FEHA.

Plaintiff contends that none of the requested information and documents are confidential and protected from discovery, under Penal Code §832.7, Evidence Code §1043, the attorney-client privilege, the attorney work-product doctrine, or any other privilege. Plaintiff hereby incorporates by reference all of the authorities and argument regarding the relevance, discoverability, and reasons why such information and documents are not privileged as set forth above in regard to Special Interrogatory No. 2 as though set forth here in extenso.

REASON WHY FURTHER RESPONSE SHOULD NOT BE COMPELLED:

A. The City Will Amend Its Response In Light Of The Completion Of The Pending 2009 IA Investigation

This discovery request asked for information that was the subject of a then-pending internal investigation. The City accordingly and appropriately declined to provide this information until the investigation was complete. The objection to producing/providing information from an on-going investigation was both well taken and appropriate, particularly in the absence of a motion for such information under *Evidence Code* § 1043.

Evidence Code § 1043 is the exclusive method for obtaining not just police officer personnel records, but also the information from such records. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, fn. 2 (*citing Hackett v. Sup. Ct.* (1993) 13 Cal.App.4th 96, 99). It would serve no purpose if such privileged information could be obtained by other means, such as

by written or oral questioning of the officers or department. *Id.* In addition, ongoing police investigations and all of the information contained therein, are subject to their own layer of confidentiality. *County of Orange v. Sup. Ct.* (2000) 79 Cal.App.4th 759, 765. *County of Orange* relied extensively upon *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, in which the California Supreme Court held that a Sheriff Department's internal disciplinary investigation was protected from disclosure under the Public Records Act while pending, and beyond. Assessing that holding, the *County of Orange* court held that notwithstanding that the Public Records Act does not apply to civil discovery, its express exemption of police investigative files (as noted in a case involving an internal disciplinary investigation) "reinforces the view that such files are confidential in nature." *County of Orange, supra*, 79 Cal.App.4th at 765.

As indicated in defense counsel's April 2, 2010 letter, in light of the completion of the internal investigation and its provision to plaintiff as part of the disciplinary process, the City has agreed to provide amended responses to plaintiff's discovery requests, including the discovery responses at issue herein. [Pelletier Decl., ¶ 7, Ex. C.] The City is in the process of preparing and will serve these responses on or before the date of the hearing on plaintiff's Motion. [Id..] As such, the Motion, as a motion to compel, should be considered moot as to items l-n in the Notice of Motion.

B. <u>In Fact, Further Documents Have Already Been Produced</u>

In fact, however, The City has already provided plaintiff and his counsel with the documentation of the now completed 2009 IA Investigation of him as part of an administrative process. [Varner Decl., ¶ 5.] This has provided plaintiff with the information requested in the Notice of Motion subsections a (no. 2), b, d, f, g, h, and i. Plaintiff's counsel may attempt to obfuscate the issue by claiming that such production was incomplete. However, such production included the complete report of the 2009 IA Investigation as to plaintiff and the underlying information uncovered in the investigation of plaintiff. [Varner Decl., ¶¶ 5-6.] The City also produced the records of the underlying 2008 IA investigation, No. 4-26-08-1, item no. c in the Notice of Motion. [Id.] The only other material in the City's possession would be documents from investigations of other BPD officers in the 2009 IA Investigation that were not part of or

used in the investigation of plaintiff. As discussed in the opposition, that information was not requested in this Motion, nor was a proper showing made therefore. Nor is that information related to this discovery request about information pertaining to the purported "demotion" of plaintiff. Accordingly, the Motion should be denied as moot as to all records of the 2008 IA Investigation and 2009 IA Investigation which have already been provided to plaintiff.

C. The Request As Broadly Phrased Would Intrude On Attorney-Client Communications and Attorney Work Product

The Attorney-Client privilege and attorney work product objections do not relate to the internal 2009 IA Investigation as plaintiff's motion clearly presumes. Rather, the broadly phrased request would call for identification of any document that inter alia, "refers" to the purported "demotion" of plaintiff. Clearly, such could improper encompass privileged communications between the City and litigation counsel, *Evidence Code* § 952; *Mitchell v. Sup. Ct.* (1984) 37 Cal.3d 591, 601, as well as counsel's work product regarding their analysis of this claim in this case. *CCP* § 2018.010. It could also encompass any documents showing communication between the Chief of Police and the City Attorney's office seeking legal advice prior to the purported "demotion" in 2009 as well as the City Attorney's work product analyzing that issue, if any. *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371 (privilege applies to legal advice even when no litigation yet threatened); *County of Los Angeles v. Sup. Ct.* (2000) 82 Cal.App.4th 819, 833 (work product not limited to actions in anticipation of litigation). Therefore, these objections are well taken, but will not limit identification of relevant, non-privileged documents.

For all of the above reasons, no further responses should be compelled.

Dated: April 8, 2010

Burke, Williams & Sorensen, LLP

By: _____
Robert J. Tyson
Attorneys for Defendant
City of Burbank

PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 444 South Flower Street, Suite 2400, Los Angeles, California 90071-2953. On April 8, 2010, I deposited with Federal Express, a true and correct copy of the within documents:

DEFENDANT CITY OF BURBANK'S OPPOSING SEPARATE STATEMENT OF SPECIAL INTERROGATORIES AND RESPONSES IN PLAINTIFF'S MOTION TO COMPEL

in a sealed envelope, addressed as follows:

Gregory W. Smith, Esq.
Law Offices of Gregory W. Smith
6300 Canoga Ave., Suite 1590
Woodland Hill, CA 91367

Christopher Brizzolara, Esq.
1528 16th Street
Santa Monica, CA 90404
Fax: (310) 656-7701

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 8, 2010, at Los Angeles, California.

Alice Cheung

Alice Cheung